

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File Number EB-02-DL-696
)	
Marshall D. Martin)	
Owner of Antenna Supporting Structure 1220001)	NAL/Acct. No.200332500003
located in Nacogdoches, Texas)	
Etoile, Texas)	FRN 0003-7544-54

FORFEITURE ORDER

Adopted: October 25, 2004**Released: October 27, 2004**

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of two thousand five hundred dollars (\$2,500) to Marshall D. Martin, owner of antenna structure number 1220001, for willfully violating Section 17.50 of the Commission’s Rules (“*Rules*”).¹ The noted violation involves Mr. Martin’s failure to clean or repaint the antenna structure as often as necessary to maintain good visibility.

2. On February 19, 2003, the Commission’s Dallas, Texas, Field Office (“*Dallas Office*”) issued a \$10,000 *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Mr. Martin for the noted violation.² On March, 21, 2003, Mr. Martin filed a response to the *NAL*.³

II. BACKGROUND

3. On October 23, 2002, an agent from the Dallas Office inspected antenna structure number 1220001 located in Nacogdoches, Texas. At the time of the inspection the agent observed that the paint on the antenna structure was badly faded and was peeling, significantly reducing visibility of the structure to the extent that, during daylight hours, the bands could not be readily distinguished at approximately one fourth of a mile. Additionally, black cabling on the outside of the structure covered the painted metal tower further reducing visibility of the structure. On October 28, 2002, the agent interviewed Mr. Martin, who stated he was aware that the tower was in need of painting and had been in contact with tower painters.

¹ 47 C.F.R. § 17.50.

² *Marshall D. Martin*, NAL/Acct. No. 200332500003 (Enf. Bur., Dallas Office, rel. February 19, 2003).

³ The *NAL* was issued to “Martin D. Marshall.” Mr. Martin’s correct name is Marshall D. Martin. Accordingly, we re-caption this proceeding.

4. The Dallas Office issued the above-referenced *NAL* on February 19, 2003, finding that Mr. Martin had apparently willfully violated Section 17.50 of the Rules. In his response to the *NAL*, Mr. Martin requests cancellation of the proposed monetary forfeiture. Mr. Martin asserts that he did not willfully violate Section 17.50 of the Rules; that he contacted tower painters “in an effort to enhance the tower’s appearance so as to attract additional lessees” and not because he believed the tower to be in violation of the rules; that he personally believed the tower “to have good visibility”; and that he believed the tower had passed an FCC “paint inspection” prior to its registration. Additionally, Mr. Martin avers that he was preparing to paint the tower but persistent bad weather delayed the painting. Finally, Mr. Martin asserts that he has no history of violations and submits copies of his 1999, 2000 and 2001 federal income tax returns to establish his inability to pay the proposed monetary forfeiture.

5. In a telephone conversation with Bureau counsel on June 29, 2004, Mr. Martin stated that antenna structure number 1220001 was painted during April 2003.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, (“Act”),⁴ Section 1.80 of the Rules,⁵ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, (“Policy Statement”).⁶ Section 503(b) of the Act requires that the Commission, in examining Mr. Martin’s response, take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁷

7. Section 17.50 of the Rules provides that antenna structures requiring painting shall be cleaned or repainted as often as necessary to maintain good visibility. Mr. Martin states that he personally believed the tower “to have good visibility” and that he believed that his tower’s paint had passed an FCC inspection prior to the tower’s registration.⁸ The Commission does not routinely perform pre-registration paint inspections and did not do so in this case. Nothing in Mr. Martin’s response to the *NAL* warrants overturning the agent’s determination that the tower’s painted bands could not be readily distinguished at approximately one fourth of a mile.⁹ We, therefore, find that Mr. Martin violated Section 17.50 of the Rules.

8. When the FCC agent interviewed Mr. Martin, he stated that he knew the tower needed painting and he had been in contact with tower painters. This admission establishes that the violation was

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999)

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ According to Commission records, antenna structure 1220001 was registered on January 16, 2002.

⁹ In cases where there has been a conflict between an FCC agent’s opinion that the visibility of an antenna structure is insufficient to meet the requirements of Section 17.50 and a tower owner’s opinion that the structure is sufficiently visible to meet those requirements, we have relied on the inspecting agent’s observations to determine the tower’s compliance with the Rules. *See, e.g., Access.1 Communications Corp.-NY*, 18 FCC Rcd 22289, 22291 at fn 8 (Enf. Bur. 2003).

willful. Mr. Martin's explanation that he contacted the tower painters "in an effort to enhance the tower's appearance so as to attract additional lessees" – not because he believed the tower was in violation – does not negate the willfulness of Mr. Martin's violation of Section 17.50. Section 312(f)(1) of the Act, 47 USC § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act"¹⁰ Thus, even though Mr. Martin may not have intended to violate Section 17.50 of the Rules, he acted willfully by knowing the condition of the tower's paint and failing to have the tower painted.¹¹ We, therefore, find that Mr. Martin's violation of Section 17.50 was willful.

9. Mr. Martin asserts that he made preparations to paint antenna structure number 1220001, but unfavorable weather delayed the painting. Mr. Martin has not provided sufficient details to warrant consideration of this claim. For example, it is unclear whether Mr. Martin executed a painting contract after being notified of the violation or exactly when Mr. Martin made the preparations for painting. In addition Mr. Martin has not provided a detailed description of the unfavorable weather conditions which delayed the painting and the dates on which those conditions occurred.

10. We find that Mr. Martin has a history of overall compliance and, accordingly, reduce the forfeiture amount to \$8,000. Additionally, in support of his financial hardship claim, Mr. Martin submits copies of his 1999, 2000 and 2001 federal income tax returns. The Commission has determined that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.¹² After reviewing the financial data submitted, we find that the proposed monetary forfeiture amount should be further reduced to \$2,500.¹³

11. We have examined Mr. Martin's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Mr. Martin willfully violated Section 17.50 of the Rules, and we find that, although cancellation of the proposed monetary forfeiture is not warranted, reduction of the forfeiture amount to \$2,500 is appropriate.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Rules,¹⁴ Mr. Martin **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$2,500 for willfully violating Section 17.50 of the Rules.

¹⁰ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991); see also *Nan Tan Computer Co.*, 9 FCC Rcd 3092 (1994).

¹¹ See, e.g., *Access.1 Communications Corp.-NY*, *supra*.

¹² See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

¹³ *Id.* at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corp.*, 7 FCC Rcd 6741 (Com. Car. Bur. 1992) (forfeiture not deemed excessive where it represented approximately 3.9 percent of the violator's gross revenues).

¹⁴ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁵ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class and certified mail, return receipt requested, to Marshall D. Martin, P.O. Box 532, Etoile, Texas 75944.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Bureau Chief, Enforcement Bureau

¹⁵ 47 U.S.C. § 504(a).

¹⁶ See 47 C.F.R. § 1.1914.